

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 02 December 2003

BALCA Case No.: 2002-INA-290
ETA Case No.: P2000-CA-09505857/ET

In the Matter of:

JOE FURGEL AUTO PARTS & SERVICE, INC.
Employer,

on behalf of

JUAN JOSE JOCON-YUPE,
Alien.

Appearance: Omer G. Sewell, Esquire
Upland, California

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of auto mechanic.¹ The CO denied the application and Employer requested review pursuant to

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon

STATEMENT OF THE CASE

On January 11, 2000, Employer, Joe Furgel Auto Parts & Service, Inc., filed an application for labor certification to enable the Alien, Juan Jose Jocon-Yupe, to fill the position of "Auto Mechanic." (AF 11). An eighth grade education and two years of experience in the job offered were required.

On May 6, 2002, and citing 20 C.F.R. §§656.21(b)(6); 656.24(b)(2)(ii), the CO issued a Notice of Findings ("NOF"), proposing to deny certification based upon Employer's unlawful rejection of a U.S. worker. (AF 24-26). Specifically, the CO found that despite the fact that U.S. applicant Osuna had thirty-five years of experience as an auto mechanic, Employer did not give this applicant the benefit of a personal interview prior to rejecting him. Therefore, the applicant was considered qualified and he did not appear to have been rejected for a lawful, job-related reason. Employer was directed to document that this U.S. worker was rejected for lawful, job-related reasons. (AF 25).

Employer responded by letter dated May 23, 2002. (AF 19). Therein, Employer's owner stated that the resume submitted by U.S. applicant Osuna revealed that he had no education in auto mechanics repair and no training in auto mechanics repair. Employer further asserted that he spoke to this applicant briefly when he came in and the applicant stated that he had been working at a truck yard as a truck maintenance technician for over twenty years. Employer contended that this applicant was well qualified to work on trucks, but lacked the experience to work on auto repairs, and would have to be trained in auto systems. Based on his review of the resume and the applicant's statements, Employer's

which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

owner asserted that he knew this applicant would not be able to be “put on the line to do auto repairs,” and the applicant was rejected based on his lack of experience. (AF 19-20).

A Final Determination was issued on June 12, 2002. (AF 17-18). The CO determined that Employer had failed to document lawful job related reasons for the rejection of U.S. applicant Osuna. The CO determined that Osuna’s resume revealed thirty-five years of experience as an auto mechanic, as well as training under Ford Motor Company. Accordingly, Employer’s minimum requirement of two years of experience was met and this applicant was considered qualified. Employer’s rebuttal failed to establish the lawful rejection of this U.S. worker. (AF 18).

On July 12, 2002, Employer requested review of the denial of labor certification by the Board of Alien Labor Certification Appeals (“BALCA” or “Board”) and the matter was docketed in this Office on September 13, 2002. (AF 1).

DISCUSSION

In its letter submitted with the appeal, signed by Employer and Alien, the arguments submitted in rebuttal are reiterated.² It continues to be Employer’s contention that this applicant lacked the requisite experience in auto mechanics, which warranted employer’s decision not to interview him. Employer points out that the applicant had experience as a vehicle maintenance technician, not an auto mechanic, the former position consisting of lower level duties such as changing oils, fluids, replacing spark plugs, etc. No evidence in support of this argument on the issue of the job distinctions was provided with rebuttal or on appeal.

U.S. applicant Osuna submitted a resume which indicated under Job objective, “auto mechanic, thirty-five years experience.” (AF 40). His resume listed only one job, with

²Therein, Employer also asserts, for the first time, that it was the owner’s son and not the owner who spoke to the applicant when he came in with his resume.

General Telephone from 1977 to 1995, as a vehicle maintenance technician. No other employment is listed. While Employer contends that the "job objective" is just that, and not an indicator of the years of experience had by this applicant as an auto mechanic, this is certainly not clear from the resume. The resume lists only one position, dating from 1977 to 1995, for a total of eighteen years, while claiming that the applicant had thirty-five years of experience. It also lists education with Ford Motor Company and Chrysler Motor Company. Osuna listed skills which included braking systems, tune-up, preventative maintenance, diagnostics, transmissions and air-conditioning. (AF 40).

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith recruitment are grounds for denial. *See* 20 C.F.R. §§656.1, 656.2(b). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). Moreover, the employer must establish by convincing evidence that an applicant whose resume indicates he or she is qualified is not qualified - the employer cannot shift the burden to the CO to show that the U.S. worker is qualified. *Fritz Garage*, 1988-INA-98 (Aug. 17 1988)(*en banc*). Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that the applicant meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*).

Such was the case here. The evidence is clear that this applicant potentially had the experience required and an interview was warranted. Employer's rejection of this applicant without the benefit of an interview reveals less than good faith recruitment on its part, particularly when Osuna was the only U.S. applicant who applied and who appeared to be

qualified for the position. Employer had the burden to further investigate his qualifications in a personal interview. To summarily reject him without the benefit of an interview points to less than good faith recruiting. Accordingly, certification was properly denied and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date

and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.